RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF COLORADO

BRIEF OF MASSACHUSETTS, HAWAII, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, ILLINOIS, IOWA, MAINE, MARYLAND, MINNESOTA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The *Amici* States share a sovereign and compelling interest in protecting our residents and visitors from discrimination. Like Colorado, we support civil rights protections for LGBTQ people, including prohibitions on discrimination in places of public accommodation: the inns, diners, stores, and other businesses that are part of daily life in a free society.

Petitioners and their *amici* contend that the States have a less than compelling interest in prohibiting discrimination against LGBTQ people by the businesses in their communities. We strongly disagree. Public accommodations laws respond to the pervasive discrimination LGBTQ people have long suffered and continue to suffer today. These laws ensure equal access to goods and services and combat the severe personal, economic, and social harms caused by discrimination.

The *Amici* States also share an interest in upholding the rights protected by the First Amendment. But the First Amendment does not shield commercial businesses from content-neutral, generally applicable civil rights laws like the one Petitioners violated.

Allowing commercial businesses to use the First Amendment as a shield for discriminatory conduct would undermine state civil rights laws and the vital benefits they provide to residents and visitors, leaving behind a society separate and unequal by law. Many Americans would face exclusion from a host of everyday businesses or, at the very least, the ever-present threat that any business owner could refuse to

serve them when they walk in the door—simply because of their sexual orientation, or their race, religion, or gender.

The *Amici* States therefore join Colorado in asking this Court to affirm the decision below.

SUMMARY OF ARGUMENT

Since the mid-nineteenth century, statutes prohibiting discrimination in places of public accommodation have been a centerpiece of state efforts to combat the economic, personal, and social harms caused by invidious discrimination. *See Romer v. Evans*, 517 U.S. 620, 627-28 (1996); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984). These statutes have long been held constitutional as applied to commercial businesses. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964).

This case concerns a bakery operating as a conventional public accommodation. Despite having opened its doors to the public, the bakery refuses to sell same-sex couples any wedding cake, regardless of design, claiming a constitutional right to refuse equal service to certain members of the public based on its owner's personal beliefs. We have heard this kind of claim before. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 298 n.1 (1964); *Newman v. Piggie Park Enters. Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part* 377 F.2d 433 (4th Cir. 1967), *aff'd in relevant part* 390 U.S. 400 (1968) (rejecting a claim that the Free Exercise clause provided a restaurant a right to discriminate against African Americans based

on sincerely held religious beliefs). History has taught us to be wary.

This Colorado bakery is one of a growing number of businesses raising First Amendment challenges to state laws prohibiting discrimination against LGBTQ people. To date, federal and state courts have uniformly and rightly rejected the arguments raised here: that the Free Speech Clause grants a vague class of "creative" businesses a license to discriminate against people simply on the basis of their sexual orientation, and that the Free Exercise Clause gives all businesses a right to discriminate based on their owners' personal religious beliefs. The same result is warranted here.

The federal constitution simply does not provide commercial businesses a right to "pick and choose" customers in violation of state law. *Bell v. Maryland*, 378 U.S. 226, 254-55 (1964) (Douglas, J., concurring); *see also Marsh v. Alabama*, 326 U.S. 501, 505-06 (1946). Enforcing content- and viewpoint-neutral public accommodations laws to prevent commercial businesses from refusing to serve customers because of their race, gender, religion, or sexual orientation does no harm to either free exercise or free speech rights. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

Petitioners' contentions to the contrary would open up a dangerous exemption, stretching far beyond the matter of one couple's wedding cake. States cannot effectively fight discrimination in the commercial marketplace—or in employment, housing, or other

contexts—if personal belief operates as a "law unto itself." *Employment Div.*, 494 U.S. at 879; *see also Lombard v. Louisiana*, 373 U.S. 267, 281 (1963) (Douglas, J., concurring). Yet the exemption Petitioners seek under the Free Speech Clause would permit business owners holding racist, sexist, or otherwise discriminatory beliefs to summarily refuse service based solely on prospective customers' identity, so long as their business activities fell within an imprecise "expressive" category. Petitioners' proposed exemption thus risks licensing all manner of harmful discrimination—and risks once again subjecting millions of people to the mercy of business owners as to who is worthy of service. The First Amendment does not bar States' efforts to combat the societal disintegration and economic balkanization caused by this kind of discrimination.

ARGUMENT

I. States across the country have enacted laws to combat discrimination against LGBTQ people in the commercial marketplace.

The States have a sovereign and compelling interest in protecting their residents, and particularly members of historically disadvantaged groups, from the harms caused by discrimination. *See Roberts*, 468 U.S. at 624; *see also* Part II.A.2, *infra* (describing why Colorado's law meets even strict scrutiny). In furtherance of this interest, many States and other jurisdictions throughout the country have acted to protect LGBTQ people from discrimination in places of public accommodation. *See* Appendices A and B,

infra (collecting laws covering 21 states, the District of Columbia, and 100 local jurisdictions outside the 21 states).

A. LGBTQ Americans are a historically disadvantaged group.

LGBTQ Americans have faced a long history of invidious discrimination—including legally sanctioned discrimination. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2596-2597, 2604, 2606 (2015); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 967-68 (Mass. 2003). LGBTQ people have been fired from their jobs, evicted from their homes, and denied service by businesses across the country simply because of their "distinct identity." *Obergefell*, 135 S. Ct. at 2596 (recognizing, further, that sexual orientation is "a normal expression of human sexuality"). They have also been harassed, assaulted, and killed because of that identity.

Discrimination against LGBTQ people is a severe and continuing problem. LGBTQ Americans are still much more likely to be bullied, harassed, and targeted for hate crimes than their non-LGBTQ peers.[1] LGBTQ people also report overt discrimination,

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[1] *See, e.g.*, Haeyoun Park & Iaryna Mykhyalyshyn, *LGBT People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, New York Times (June 16, 2016), www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html (analyzing FBI crime data); *see also* Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2015*, 65 Morbidity & Mortality Weekly Rep. Surveill. Summ. 1 (June 10, 2016) (discussing risks for LGBTQ youth).

particularly in the form of denial of service by businesses, at rates comparable to, or greater than, those for other historically disadvantaged groups.[2]

This continuing discrimination harms the health and well-being of LGBTQ people, their families, and their communities. A large and growing body of evidence shows that discriminatory social conditions have severe negative health impacts on LGBTQ people, including increased rates of mental health disorders and suicide attempts, especially for LGBTQ youth.[3] Notably, these problems are less severe and

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[2] *See* Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, The Williams Institute (Feb. 2016); Christy Mallory & Brad Sears, *Documented Evidence of Employment Discrimination and Its Effect on LGBT People*, The Williams Institute (July 2011).

[3] *See, e.g.*, Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12—United States and Selected Sites: 2015*, 65 Morbidity & Mortality Weekly Report Surveill. Summ. 1 (Aug. 12, 2016); Mark L. Hatzenbuehler et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 Soc. Sci. & Med. 33 (2014); Laura S. Richman & Mark L. Hatzenbuehler, *A Multilevel Analysis of Stigma and Health: Implications for Research and Policy*, 1 Pol'y Insights from the Behav. & Brain Sci. 213, 217 (2014); Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 Pediatrics 896 (2011); Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 Am. J. Pub. Health 452, 454-55 (2010); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674 (2003).

pervasive in communities that provide LGBTQ people with legal protection against discrimination.[4]

B. States prohibit discrimination against LGBTQ people in the commercial marketplace to prevent severe economic, personal, and social harms.

Discrimination by places of public accommodation causes unique and severe economic, personal, and social harms. It denies individuals equal access to important goods and services and, by balkanizing the market, has a well-established "substantial and harmful effect" on the economy. *Heart of Atlanta*, 379 U.S. at 258 (acknowledging broad impacts of seemingly local discrimination); *see also Roberts*, 468 U.S. at 625-26. Such discrimination also stigmatizes its victims, causing them intense dignitary injuries, and encourages social fragmentation and conflict. *See Roberts*, 468 U.S. at 625-626; *Daniel v. Paul*, 395 U.S. 298, 306 (1969); *Heart of Atlanta*, 379 U.S. at 250.

As this Court has recognized, "[n]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a...citizen who seeks only equal treatment"—than a denial of equal service by a business "ostensibly open to the general public." *Daniel*, 395 U.S. at 306 (quoting President Kennedy on the harms caused by racial discrimination in public accommodations); *see also Heart of Atlanta*, 379 U.S. at 292 (Goldberg, J., concurring) ("Discrimination is not simply dollars and

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[4] *See* Hatzenbuehler (2014), *supra* n.3; Richman & Hatzenbuehler (2014), *supra* n.3.

cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." (quoting S. Rep. No. 872, 88th Cong., 2d Sess., at 16 (1964))).[5]

The American legal and political system has long recognized the importance of public accommodations being open to all. Today's statutes codify, and expand upon, a common law doctrine, dating back at least to the sixteenth century, that generally required public accommodations to serve all customers. *See Heart of Atlanta Motel*, 379 U.S. at 261; *Bell*, 378 U.S. at 296-98; *Lombard*, 373 U.S. at 275-77 & n.6. States began enacting public accommodations statutes in 1865 to ensure service was not denied to African Americans. *See Act Forbidding Unjust Discrimination on Account of Color or Race*, 1865 Mass. Acts, ch. 277 (May 16, 1865). Although there is some variation across the States, "public accommodations laws" generally guarantee that when customers enter a business that has opened its doors to the public, they will not be denied service simply because of the color of their skin, their gender, their disability, or—under many state and local laws—their sexual orientation.

A majority of Americans now live in communities that prohibit places of public accommodation from discriminating on the basis of sexual orientation.

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[5] The argument by *Amici* State of Texas, et al., that Respondents Craig and Mullins "have suffered no tangible harm," Br. 32, is thus contrary to this Court's precedent and common sense.

Twenty-one States and the District of Columbia protect their residents against discrimination in public accommodations on the basis of sexual orientation.[6] These state-level protections are supplemented by local laws and ordinances that have been enacted by hundreds of cities, towns, and counties across the country.[7] Only seven States appear to have neither a state nor any local public accommodations law that covers sexual orientation.[8]

These laws reflect the States' and localities' recognition of the "overwhelming" evidence of discrimination against LGBTQ people. *See, e.g.*, *Telescope Media Grp. v. Lindsey*, No. 16-4094, __ F. Supp. 3d __, 2017 WL 4179899, *15 & n.25 (D. Minn. Sept. 20, 2017) (describing the history behind

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[6] These States are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See Appendix A, *infra*, collecting citations to these laws. According to the United States Census Bureau, as of 2016, these States had a cumulative population of more than 140 million people. *See id.*

[7] See Appendix B, *infra*, collecting citations to local laws and ordinances in states that do not have statewide laws protecting against discrimination in public accommodations based on sexual orientation. These local laws protect LGBTQ people in jurisdictions with a cumulative population of well over 33 million people. *See id.* The total number of Americans living in jurisdictions that have statewide or local laws is thus over 174 million (or 53.9% of the national population of 323 million). *See supra* n.6.

[8] These States are Arkansas, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, and Utah.

Minnesota's 1993 law barring discrimination on the basis of sexual orientation); N.Y. Sexual Orientation Non-Discrimination Act of 2002, ch. 2, § 1 (finding that prejudice on account of sexual orientation "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering...[and] fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual," and that it "menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants"). And they ban the very "acts of discrimination"—and only those acts—"that produce the harm the [laws] seek[] to prevent." *Telescope Media*, 2017 WL 4179899, at *16 (quoting state policy "'to secure for persons in this state, freedom from discrimination'").

II. The First Amendment does not exempt commercial businesses from state anti-discrimination laws.

There is no real dispute in this case that Petitioners discriminate against LGBTQ customers: Petitioners categorically refuse to sell LGBTQ couples wedding cakes of any design. *See* Pet. Br. 21. Petitioners insist that this refusal is not because of the customers' sexual orientation, but because they are same-sex couples. *See id.* at 11. That is a distinction without a difference. *See Christian Legal Soc. v. U.C. Hastings*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). Petitioners similarly insist that the company "serves all people" because it will

sell other baked goods to LGBTQ couples. Pet. Br. 8-9, 34. But public accommodations laws exist to prevent not only outright exclusion, but also separate and unequal treatment. Otherwise, our country would be blighted by segregated businesses that "served all people," but in perniciously unequal ways. *See McClung*, 379 U.S. at 296-97 (discussing restaurant that served African-American customers through a take-out window but refused to permit them in the dining area).

The First Amendment offers no refuge to commercial businesses engaging in such discrimination. The Free Speech Clause does not allow businesses—even purportedly "creative" ones—to pick and choose their customers in defiance of laws that regulate discriminatory conduct. And the Free Exercise Clause does not excuse businesses from complying with generally applicable civil rights laws, no matter the business owner's religious beliefs.

A. State public accommodations laws do not violate the Free Speech Clause when applied to people with objections to serving LGBTQ customers.

Colorado's enforcement of its content- and viewpoint-neutral public accommodations law to prevent a commercial business from denying service to LGBTQ customers does not violate the Free Speech Clause of the First Amendment.

1. By prohibiting discrimination in the commercial sale of goods and services, public accommodations laws regulate conduct, not speech or expressive activity.

The simplest way to resolve Petitioners' free speech challenge is to recognize that laws prohibiting businesses from discriminating against customers in the commercial sale of goods and services do not regulate speech or expressive activity protected by the First Amendment. *See Arcara*, 478 U.S. at 707; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where government does not target conduct on the basis of its expressive content, acts are not shielded from regulation because they express a discriminatory idea or philosophy.").

Public accommodations laws like Colorado's are content-neutral, generally applicable statutes that neither compel nor regulate speech or expression. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 624, 628-29. As the United States concedes, these laws neither target any conduct because of its expressive content, nor single out businesses engaged in First-Amendment-protected activities for any special burden. *See* U.S. Br. 14. Instead, the laws prohibit all businesses operating as public accommodations from discriminating against prospective customers.[9] And they do so to combat the

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[9] *Amici* State of Texas, et al., ignore that Masterpiece Cakeshop is a *public* accommodation when repeatedly characterizing the alleged "expression" at issue in this case as

personal, economic, and social harms caused by such discrimination "wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628.

a. Prohibiting commercial businesses from discriminating against customers does not compel speech.

Petitioners' attempt to fashion this as a "compelled speech" case is unpersuasive. *See* Pet. Br. 25-29. The First Amendment prohibits States from "telling people what they must say" or requiring them to "speak the government's message," *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.* (*FAIR*), 547 U.S. 47, 61, 63 (2006), but public accommodations statutes like Colorado's do neither.

Indeed, Colorado's public accommodations law does not regulate Petitioners' speech at all. In *FAIR*, this Court rejected the argument that the Solomon Amendment, which prohibited law schools from discriminating against military recruiters when providing campus access to outside employers, regulated the law schools' speech. *Id.* at 60. The Court concluded that the Solomon Amendment regulated "conduct, not speech" given that "[i]t affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* That reasoning applies equally to this case. State anti-discrimination laws like Colorado's affect what public accommodations "must *do*"—provide equal

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"*private* artistic expression." Br. 15, 24, 25, 26, 28 (emphasis added).

access to LGBTQ people—"not what they may or may not *say*." *Id.*

Petitioners, in other words, are not required, by virtue of Colorado's public accommodations law, to speak or endorse a government motto, pledge, or message. *See FAIR*, 547 U.S. at 62. They refused to serve the Respondent couple because of the couple's sexual orientation, and it was that refusal to "afford equal access" that violated Colorado law. *Id.* at 60.

Even assuming, as Petitioners argue, that cake-making is a form of expression, Colorado law does not "compel" Petitioners to make cakes, govern how they design their cakes, or otherwise regulate the process of cake-making. Petitioners are under no obligation to offer wedding cakes as a service of their business, nor to make their cakes in any particular way. All that Colorado's law requires is that Petitioners make wedding cakes for LGBTQ customers if, and to the extent that, they make wedding cakes for other customers.[10]

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[10] Public accommodations laws also leave businesses like Masterpiece Cakeshop free to disclaim any message they worry may be communicated in the course of providing non-discriminatory service to customers. Petitioners, for example, may create and disseminate a disclaimer stating that Colorado law prohibits them from discriminating on the basis of sexual orientation and other protected characteristics, and that their provision of service to a customer does not constitute "an endorsement or approval" of any customer or conduct. *See* Pet. App. 35a-36a; *see also FAIR*, 547 U.S. at 64-65; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-88 (1980).

This type of equal access or non-discrimination requirement is a "far cry" from laws "dictat[ing] the content of...speech." *FAIR*, 547 U.S. at 62 (distinguishing *Wooley v. Maynard*, 430 U.S. 705 (1977), and *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), because, under the Solomon Amendment, speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters"). As this Court noted in *FAIR*, it does not compel speech to "prohibit employers from discriminating in hiring on the basis of race." *Id.* That is precisely the kind of prohibition Colorado has imposed in this case.

b. Prohibiting commercial businesses from discriminating against customers does not target expressive conduct.

The First Amendment "has no relevance to a statute directed at imposing sanctions on nonexpressive activity." *Arcara*, 478 U.S. at 707. Here, Colorado law has not targeted Petitioners because they engage in "artistic expression," but because they discriminate against customers in the commercial sale of goods and services. The act of selling customers baked goods is a distinctly nonexpressive activity; it lacks the "inherently expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *FAIR*, 547 U.S. at 64; *see also Bell*, 378 U.S. at 254-55 (Douglas, J., concurring) (explaining that a business has no "constitutional right to pick and choose its customers"). And Petitioners cannot bring ordinary commercial activity within the scope of the First Amendment simply by asserting that it has some

indirect and nebulous expressive quality—*e.g.*, that selling a same-sex couple a wedding cake on the same terms as all other customers would communicate a personal endorsement of their marriage. *See* Pet. Br. 23-24. The First Amendment protects this type of activity only if it communicates a message that will be understood, and attributed to the speaker, by a reasonable member of the public. *See FAIR*, 547 U.S. at 66. Petitioners' conduct—selling cakes from a commercial bakery—does not meet that standard.

This Court in *FAIR* "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 547 U.S. at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (quotation marks omitted)). Noting that some conduct becomes "expressive" only when the actor "accompanie[s] their conduct with speech explaining it," this Court explained that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66.

That is exactly what Petitioners have attempted to do in this case. The presence of a particular cake at a particular wedding says nothing about the views of the bakery that sold it regarding marriage—or, indeed, any other subject. An observer would have no way of knowing whether the cake was there because the baker supported the marriage, or because the couple offered a large sum of money to make it, or because the baker and the couple were personal friends, or because a bride simply walked into a bakery and ordered a wedding cake without introducing her fiancée. *Cf. id.*

("An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.").

Moreover, bakeries do not play any role in their customers' weddings that reasonably suggests they have anything other than a commercial relationship with the event or with the couple. *See Texas v. Johnson*, 491 U.S. 397, 405 (1989) (directing that expressive activity must be evaluated "in context"). Bakers are not wedding officiants; they do not bless or solemnize the marriage.[11] Petitioners make much of the "cutting the cake ritual" that occurs at many (but not all) receptions—but they are not the ones holding the knife. *Cf.* Pet. Br. 6-7.[12] The message of

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[11] In fact, Colorado does not even require couples to have a wedding ceremony (religious, civil, or otherwise). *See* Colo. Rev. Stat. § 14-2-109(1) (authorizing self-solemnized marriages).

[12] The United States' brief fails in its attempt to address this issue. It contends that the public could understand a message of support—or at least neutrality—from the sale of a wedding cake in the same way "a reasonable observer of a statue memorializing a military victory could fairly infer that its sculptor at least was not a pacifist." Br. 26. Putting aside other problems with this analogy—including that it is highly unlikely that any public accommodations law would apply in such a circumstance due to the lack of a protected class—this example simply assumes, without basis, that the public has some way of knowing about a commercial bakery's role in selling a customer a particular wedding cake, and views that role as equivalent to that of an artist sculpting a public monument.

celebration that accompanies this ritual is communicated not by the cake-maker, but by the married couple, along with their family and friends.

In sum, Petitioners conflate laws applying to them simply because they operate as a commercial business with laws targeting the content of their "expressive" activity. Petitioners' comparison to tattooing is illustrative. *See* Pet. Br. 18. Several courts have indeed held that tattooing is a form of protected artistic expression. *See Buehrle v. City of Key West*, 813 F.3d 973, 975 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). But it does not follow, and no court has ever suggested, that tattoo parlors are therefore free to exclude customers on the basis of the color of their skin—the tattoo artist's "canvas"—or otherwise violate content-neutral civil rights laws. This Court, too, should maintain the fundamental distinction between statutes that are "directed at imposing sanctions on nonexpressive activity," *Arcara*, 478 U.S. at 707, and those that are not.

2. Public accommodations laws like Colorado's would survive intermediate or strict scrutiny.

Even if prohibiting Masterpiece Cakeshop from discriminating against its LGBTQ customers caused some cognizable injury to free speech rights, a constitutional violation would not follow. A content-neutral state law directed at conduct—like requiring businesses to serve all customers regardless of race, gender, religion, or sexual orientation—that incidentally burdens freedom of speech is

constitutional if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Such a law need only promote a substantial interest "that would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67-68 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Colorado's law easily clears *O'Brien*—a point neither the United States nor Petitioners attempt to dispute. Indeed, it would survive even strict scrutiny. As this Court has found time and again, "public accommodations laws 'plainly serv[e] compelling state interests of the highest order.'" *Duarte*, 481 U.S. at 549 (quoting *Roberts*, 468 U.S. at 624).

a. States have a compelling interest in eliminating sexual orientation discrimination in the commercial marketplace.

States' "compelling interest of the highest order" in eliminating discrimination in places of public accommodation is no less compelling when invoked to protect LGBTQ people than when invoked to protect other groups that have faced, and continue to face, invidious discrimination. *Duarte*, 481 U.S. at 549 (quoting *Roberts*, 468 U.S. at 624). Courts across the country have recognized as much. *See, e.g.*, *Telescope Media*, 2017 WL 4179899, at *15; *Gifford v. McCarthy*, 137 A.D.3d 30, 40 (N.Y. App. Div. 2016); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty.*

Superior Court, 189 P.3d 959, 968 (Cal. 2008); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31-37 (D.C. 1987).

As described above, LGBTQ Americans continue to suffer severe and pervasive discrimination in employment, housing, and places of public accommodation, among other facets of their everyday lives. *See* Part I, *supra*, at 5-6 & nn.1-2. The injuries caused by discrimination are "surely felt as strongly by persons suffering discrimination on the basis of their [sexual orientation] as by those treated differently because of their [gender or race]." *See Roberts*, 468 U.S. at 625 (comparing gender and racial discrimination). And, indeed, research bears that out. *See* Part I, *supra*, at 6-7 & nn.3-4.

Petitioners mischaracterize the nature of the harm here in questioning whether vindicating dignitary interests can justify an intrusion on First Amendment rights. Pet. Br. 53-54. Petitioners cite cases concerning the extent of the governmental interest in "protecting the dignity" of audiences from the "hurtfulness" of offensive or disagreeable speech—for example, foreign diplomats seeing signs "critical of their governments or governmental policies," *Boos v. Barry*, 485 U.S. 312 (1988), or public figures seeing themselves parodied in a magazine, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). But here, the Respondent couple were not simply forced to *hear* a hurtful message regarding views on their marriage; that is, this is not a case about "shield[ing] the sensibilities of listeners," *United States v. Playboy Enter. Grp., Inc.*, 529 U.S. 803, 813 (2000). Rather, they were actually *refused service* on account of their

sexual orientation. This Court has long recognized the significant harm caused by such discrimination and the States' concomitant compelling interests in preventing such harms. *See, e.g.*, *Duarte*, 481 U.S. at 549.

Petitioners also question whether the States' compelling interest in combatting discrimination extends to discrimination motivated by "sincerely held religious beliefs." *See* Pet. Br. 52-53. The answer is a resounding "yes." This Court has refused to divide the state interest in combatting discrimination into "religious" and "secular/invidious" categories. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604-05 (1983) (holding that the federal government has a compelling interest in eradicating racial discrimination based on religious opposition to interracial dating and marriage). Many forms of discrimination this country has struggled to eradicate have been justified by some on the basis of "sectarian [religious] doctrine." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting). This is particularly true in the context of marriage. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."). Within the lifetime of many couples still together today, opposition to interracial marriage was explicitly justified on religious grounds. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial judge's opinion that "Almighty God" disapproved of interracial marriage). Such discrimination is no less harmful to its victims when motivated by religious belief.

Petitioners have an unquestioned constitutional right to hold and advocate their beliefs. Colorado is in no way attempting to interfere with that right. Like other States, however, Colorado has a compelling interest in ensuring that when a business enters the commercial marketplace, it does not discriminate against customers based on its owner's or employees' beliefs, religious or otherwise. *See Piggie Park*, 256 F. Supp. at 945.

b. Public accommodations laws are narrowly tailored to serve the States' compelling interest in combatting discrimination.

Just as employment discrimination laws are "precisely tailored" to advance the state interest in providing "equal opportunity to participate in the workforce," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014), public accommodations laws are precisely tailored to advance the state interest in ensuring equal access to the commercial marketplace, *see Roberts*, 468 U.S. at 628.

Public accommodations laws directly combat the economic, personal, and social harms caused by discrimination. By guaranteeing full and equal access to the commercial marketplace, these laws ensure that LGBTQ residents are not denied—or forced to overcome artificial barriers to acquire—"tangible goods and services." *Roberts*, 468 U.S. at 625-26; *see also Romer*, 517 U.S. at 631 ("[T]hese are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life."). Petitioners argue that such protections

are unnecessary because, even if Petitioners close their doors to LGBTQ couples, LGBTQ people can find other bakers to serve them. *See* Pet. Br. 60-61. But this assertion entirely misses the point of anti-discrimination laws: to ensure that people will *not* be turned away from a business on account of their race, gender, religion, or sexual orientation. Petitioners' "just go elsewhere" argument would eviscerate this central purpose and justify segregated businesses throughout the United States.

Critically, public accommodations laws also provide protection from the "stigmatizing injury" and "deprivation of personal dignity" that necessarily "accompanies denials of equal access to public establishments." *Roberts*, 468 U.S. at 625. By ensuring that the commercial marketplace is open to the entire public, these laws foster not only the economic, but also the social and political integration of residents. *Id.*; *see also Gay Rights Coal.*, 536 A.2d at 37. In so doing, these laws deliver many benefits, including counteracting the negative health effects caused by stigmatization and social exclusion.[13] In short, Colorado's law and its analogues across the country serve to vindicate the "equal dignity" of LGBTQ people. *Obergefell*, 135 S. Ct. at 2608.

Given these "compelling state interests of the highest order" directly served by public accommodations laws, *Duarte*, 481 U.S. at 549 (quotation marks omitted), the First Amendment does not require creating an exemption from these laws based on a business owner's views. Any such

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[13] *See* Hatzenbuehler (2014), *supra* n.3; Richman & Hatzenbuehler (2014), *supra* n.3.

exception would not constitute better tailoring; rather, it would frustrate the laws' very purpose. Laws like Colorado's effectively ensure equal access to goods and services, thereby combatting dignitary harms, only when they comprehensively cover the commercial marketplace; States cannot both combat discrimination and, at the same time, license businesses to discriminate. "When the doors of a business are open to the public, they must be open to all...if apartheid is not to become engrained in our [society]." *Lombard*, 373 U.S. at 281 (Douglas, J., concurring). A categorical "expressive" business exemption to public accommodations laws would thus substantially undermine the States' compelling interests in eliminating invidious discrimination.

3. State laws prohibiting discrimination have long been held constitutional as applied to commercial businesses.

For well over a century, courts have consistently upheld the constitutionality of public accommodations laws against challenges by businesses seeking to discriminate based on "personal convictions." *McClung*, 379 U.S. at 298 n.1 (rejecting argument that restaurant could discriminate against African Americans based on "personal convictions and...choice of associates," as argued in the Brief for Appellees, No. 543, 1964 WL 81100, at *32-33 (U.S. Oct. 2, 1964)). This Court has long decried discrimination in public establishments as a "unique evil" entitled to "no constitutional protection," *Roberts*, 468 U.S. at 628-29, and has described state laws prohibiting such

discrimination as "unquestionab[ly]" constitutional, *Heart of Atlanta*, 379 U.S. at 260-61.

Petitioners (and their *amici*) have not identified a single case in which a court expressed concern about the constitutionality of a state effort to prohibit discrimination by commercial enterprises. Instead, relying on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), Petitioners seek to extend protections afforded to private, non-commercial organizations engaged in activity at the core of the First Amendment's protections—expressive association—to cover discrimination by a broad swath of commercial businesses. In so doing, Petitioners "stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 547 U.S. at 70.

Dale and *Hurley* involved "peculiar" attempts by States to use their public accommodations laws to regulate the First Amendment activities of private, expressive associations. *See Hurley*, 515 U.S. at 559, 572-73; *Dale*, 530 U.S. at 643-44, 648, 657-58. But there is nothing peculiar about Colorado's application of its public accommodations law to prevent a commercial bakery, open to the general public, from discriminating against a certain class of potential customers. Eliminating discrimination in such transactions is the core concern of public accommodations laws. As the Court was careful to point out in *Hurley* and *Dale*, a State's attempt to dictate who marches in a private parade, or who must be admitted to a private group, implicates speech and

associational rights that are not at issue in cases involving discrimination by ordinary commercial enterprises. *See Dale*, 530 U.S. at 657-58; *Hurley*, 515 U.S. at 572-73; *see also Roberts*, 468 U.S. at 638 (O'Connor, J., concurring).

Here, Masterpiece Cakeshop is a "clearly commercial entity," *Dale*, 530 U.S. at 657; its sale of goods and services is not analogous to putting on a parade, and it has no protected expressive interest in its relationship with its customers. *See FAIR*, 547 U.S. at 69 (holding that *Dale* is inapplicable to cases that do not involve state attempts to force an "expressive association" to "accept members it does not desire"); *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring); *Bell*, 378 U.S. at 254-55 (Douglas, J., concurring); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1073 (7th Cir. 2013). Moreover, Colorado's compelling interest in prohibiting discrimination in the commercial marketplace is directly implicated by a commercial bakery's refusal to serve same-sex couples in a way that it would not be by the activities of a non-commercial, distinctly private group. *Cf. Dale*, 530 U.S. at 657-59; *Hurley*, 515 U.S. at 578.

B. State public accommodations laws do not violate the Free Exercise Clause.

Prohibiting Petitioners from discriminating against LGBTQ customers also does not violate the Free Exercise Clause. Petitioners' claim that they have a free exercise right to refuse to serve customers when doing so conflicts with their religious beliefs is a claim that was rejected decades ago when used to justify racial discrimination. Courts rightly "refuse[d]

to lend credence or support to [a business owner's] position that he ha[d] a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs." *Piggie Park*, 256 F. Supp. at 945; *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting as "patently frivolous" the "defendants' contention that the [1964 Civil Rights Act] was invalid because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant's religion" (quotation marks omitted)). Businesses today have no more of a right to justify their discrimination against LGBTQ individuals on religious grounds.

Since the days of *Piggie Park*, this Court has clarified that, more generally, the Free Exercise Clause does not excuse businesses from complying with neutral laws of general applicability. *Employment Div.*, 494 U.S. at 879. For free exercise purposes, a law is neutral and generally applicable if it does not target religion and "prohibit[s] conduct the State is free to regulate." *Id.* at 878-79. Petitioners do not seriously challenge that public accommodations laws like Colorado's, on their face, meet this requirement.

Instead, Petitioners question whether the Colorado statute has been applied in a neutral manner. Petitioners point to a decision by the Respondent Commission finding no violation by a group of bakers who refused to make bible-shaped cakes that included offensive messages about LGBTQ people—namely, that they are "detestable." *See* Pet. App. 20a n.8.

Petitioners protest that bakers "who support same-sex marriage may decline to oppose it, while those [like Masterpiece] who oppose same-sex marriage must support it." Pet. Br. 39-40. This argument reveals a deep misunderstanding of how public accommodations laws work.

Like all public accommodations laws, Colorado's law prohibits businesses from refusing to serve potential customers *"because of"* certain characteristics, like their race, sex, or sexual orientation. Colo. Rev. Stat. § 24-24-601(2)(a) (emphasis added). The Colorado Civil Rights Commission found that the bakers who declined to make the anti-LGBTQ cakes in the case Petitioners cite would have refused to make similar cakes for anyone; the refusal was not "because of" the identity of the customer. In contrast, here, Petitioners violated the law by categorically refusing to provide a service for same-sex couples that they would have provided without objection for other customers. Petitioners may insist that they simply refused to make a cake they found "offensive," but the difference between their conduct and that of the other bakers is clear: Petitioners did not refuse to sell a cake to a customer because they found the particular *cake* itself

offensive[14]; they found the sale offensive because of the identity of the *customer* requesting the cake.[15]

In essence, Petitioners' objection is really that Colorado's law includes sexual orientation as a protected characteristic. Colorado is not "playing favorites" with its law, Pet. Br. 36; rather, Colorado is enforcing the law as its legislature chose to write it. Because that law is content-neutral and generally applicable, Petitioners' free exercise claim should be rejected.

III. A First Amendment exemption to public accommodations laws of the kind sought by Petitioners would dramatically undermine anti-discrimination laws.

Petitioners' claim to a constitutional entitlement to violate Colorado's public accommodations law boils down to a claim that this Court's freedom-of-association precedents compel a decision in their favor: that "*Hurley* guarantees" that they need not sell a cake to a customer, where doing so is "objectionable"

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[14] Petitioners, in fact, refused service to Craig and Mullins without learning anything about the wedding cake they desired. Pet. App. 4a. Similarly, the record reflects that Petitioners refused to sell any cupcakes to a lesbian couple upon learning that the cupcakes were for the couple's commitment ceremony. J.A. 113-15.

[15] For the same reasons, a baker could of course refuse to make a cake containing racist messages denouncing African Americans or interracial marriage. The same baker could not, however, refuse to make a wedding cake because the couple requesting it was African-American or interracial (or, for that matter, white).

in their view. Pet. Br. 27. But that claim proves far too much and would dramatically undermine state and federal anti-discrimination laws.

First, Petitioners offer no principled basis for distinguishing a bakery from myriad other businesses seeking to claim such an exemption. A website designer, architect, sign-maker, hairdresser, make-up artist, chef: each is engaged in a business that may in some way touch on "expressive" activity. Indeed, there is no reason that Petitioners' sweeping view of *Hurley* would be limited to their category of "expressive professionals," as opposed to other businesses that offer services with potentially "expressive" aspects. That is, Petitioners' putative right to refuse to create objectionable expression would seem to extend equally to many other businesses that provide either generic or custom services or furnish customers with materials that may link the business to their customers in some way—for example, signage or placards set up at a hotel or convention center or held up by a driver for a car service. If Petitioners are right about *Hurley*'s reach, LGBTQ people could be exposed to discrimination in a broad section of the commercial marketplace—particularly when they attempt to exercise their fundamental right to marry or attempt to celebrate other important life events.

A broad range of businesses is already seeking a right to discriminate against their LGBTQ customers. In addition to the florist and photographer cases known to this Court, *see Arlene's Flowers, Inc. v. Washington*, No. 17-108 (cert. pending); *Elane Photography, LLC v. Willock*, No. 13-585 (cert. denied Apr. 7, 2014), additional cases are now working their

way through the lower courts. A for-profit graphic design studio that specializes in hand-drawn invitations has sought an exemption from Phoenix's public accommodations law in order to refuse service to LGBTQ couples getting married. *See Brush & Nib Studio, LC v. City of Phoenix*, Ariz. Ct. App. No. 1 CA-CV 16-0602 (appeal from order denying preliminary injunction, Ariz. Super. Ct., Maricopa Cty., CV 2016-052251 (Sept. 16, 2016)). A website designer who wishes to design websites for couples intending to marry has sought a similar exemption from serving LGTBQ couples. *See 303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir.) (appeal from order denying in part motion for preliminary injunction in No. 1:16CV02372 (D. Colo. Sept. 1, 2017)). And a funeral home refused to provide mortuary services for an elderly man's partner. *See* First Amended Compl., *Zawadski v. Brewer Funeral Servs.*, No. 17-cv-19, Dkt. 12 (Cir. Ct., Pear River Cnty., Miss., Mar. 7, 2017). A decision from this Court in Petitioners' favor could unleash a torrent of such cases around the country. Indeed, an *amicus* brief filed in this case lists nearly 500 "creative professionals," all of whom, presumably, would prefer not to serve LGBTQ people. That hundreds of businesses are pleading with the Court in this very case for a constitutional exemption from public accommodations laws suggests the existence of many thousands in our society at large. Petitioners' brusque dismissal of the likelihood of demands for ever-expanding exemptions, *see* Br. 60, ignores the reality that such demands are already being made.

Second, the exemption Petitioners seek would not be limited to opposition to marriage between same-sex

couples or to beliefs rooted in religious convictions.[16] It remains a sad fact of American society that bigoted beliefs are disturbingly prevalent.[17] Under Petitioners' theory, an anti-Semitic baker could refuse to sell a wedding cake to a Jewish couple because he does not wish "to create expression that he considers objectionable." Pet. Br. 27. And a racist architect could refuse to design a family home for an interracial couple on the same grounds. Although the First Amendment tolerates all manner of odious speech in the public square, *see, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011), it does not require insulating from liability businesses that violate content-neutral laws by turning away customers because of their race, religion, gender, or sexual orientation.

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[16] Petitioners' argument is muddled on this point. For example, they argue in their "Compelled Speech" section that the problem in this case is that "the Commission *required [Phillips] to violate his faith* by celebrating opposing ideas." Br. 28 (emphasis added). But that is a free exercise claim, not a speech claim—and a meritless one, for the reasons stated in Part II.B, *supra*.

[17] *See, e.g.*, Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence: Brawling Erupts in Virginia—Opponents Clash and a Car Plows into a Crowd*, New York Times, Aug. 13, 2017, at A1; *Reuters/Ipsos/UVA Center for Politics Race Poll* (Sept. 11, 2017), http://www.centerforpolitics.org/crystalball/wp-content/uploads/2017/09/2017-Reuters-UVA-Ipsos-Race-Poll-9-11-2017.pdf (showing 16% of adults—*i.e.*, approximately 35 million people—agree that "[m]arriage should only be allowed between people of the same race," and 5% of adults—*i.e.*, approximately 12 million people—disagree that "[p]eople of different races should be free to live wherever they choose").

Third, state and federal laws barring discrimination in other areas like housing and employment would also seem vulnerable to individuals' racist, sexist, anti-LGBTQ, or otherwise discriminatory objections that the laws compelled speech in conflict with their beliefs, or tarred them by association with a group they despise. This Court has repeatedly rejected such arguments in the past. *See, e.g., Romer*, 517 U.S. at 635 ("The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."); *see also* Brief for Appellees, *McClung*, 1964 WL 81100, at *33 ("Even in a highly commercial context, a businessman has always possessed the right to deal with those he pleases, and for reasons personal to himself this right to exclude certain persons might and often does have real meaning to him...That the conviction of one may seem wrong in the eyes of others is immaterial; it is nonetheless the right of the one.").[18] But success by Petitioners here would call these bedrock precedents into question.

Petitioners' theory thus threatens to transform the First Amendment into a vast source of exemptions to anti-discrimination laws. It would create the supreme irony that anti-discrimination laws, long upheld and

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[18] As Evelyn Smith, the landlord in *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996), put it: "If it means the homosexuals and the fornicators can't find a place to live, well I am sure there are enough sinners who would rent to them.... There is no way in the world I am ever going to rent to fornicators." Maura Dolan, *Housing, Religious Rights Clash in Rental Dispute*, L.A. Times, Nov. 22, 1994, at A1.

lauded by this Court as essential to eradicating the harms of discrimination from our society, may apply only against those who hold no discriminatory beliefs in the first place. *See Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964) ("The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history."). Such a rule would undermine civil rights laws in precisely the circumstances that they are most needed: combatting housing discrimination means requiring landlords to rent to tenants to whom they may not want to rent, *see, e.g.*, *Heart of Atlanta*, 379 U.S. at 243 (a motel that refused to "rent rooms to Negroes"); combatting employment discrimination means requiring employers to hire employees they may not want to hire, *see, e.g.*, *Senello v. Reserve Life Ins. Co.*, 872 F.2d 393, 394 (11th Cir. 1989) (a company that preferred not to hire "women...Jews and Niggers"); and combatting discrimination in the public marketplace means requiring businesses to serve customers they may not want to serve. This is the heart of anti-discrimination legislation. *See Marsh*, 326 U.S. at 505-506 ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

The United States fails in its attempts to limit Petitioners' arguments to a "very narrow" exemption, applying only when a public accommodations law (1) "compels the creation" of either speech or something else that is "inherently communicative," and (2) "compels the creator's participation in a ceremony or

other expressive event." U.S. Br. 16. First, the law here simply prohibits refusing to serve customers based solely on their sexual orientation and does not compel creation of any kind. Moreover, *Hurley* itself makes clear that content generation is not always the *sine qua non* of First Amendment protection. *See* 515 U.S. at 570 (rejecting the notion that "First Amendment protection require[s] a speaker to generate, as an original matter, each item featured in the communication" and citing cases on First Amendment protection for cable operators choosing which programs to run and newspaper editors choosing which op-ed pieces to publish). And the second limitation is either absurdly narrow with no apparent guiding principle (if it applies to weddings but not to other celebrations despite the other celebrations' "expressive" nature), or so broad as to be nonexistent (if it applies to any event that can plausibly be deemed "expressive," since virtually every "event" is an occasion to communicate something). *See* Pet. Br. 27 (arguing that the *Hurley* exception extends to any event that "celebrate[s] something that [individuals engaged in expression] deem objectionable").

In sum, neither Petitioners nor the United States have put forward a theory under which *Hurley* can grant Petitioners the relief they seek on the facts of this case without drastically undermining decades of anti-discrimination law. If Petitioners are right, then, at the very least, all persons holding discriminatory views who declare themselves "creative professionals"—from butcher to baker to house renovator—may exempt themselves from both state and federal public accommodations laws and refuse to

serve those whose identities they find "offensive." Such a drastic intrusion into the States' (and Congress') prerogative to ameliorate the harms of discrimination within their jurisdictions should be soundly rejected by this Court.

Indeed, Petitioners' view of the proper scope of anti-discrimination law hearkens back to a societal structure from which this country has been trying to recover for decades. During the mid-twentieth century, an African-American mailman from New York published a guide called the "Negro Motorist Green Book." It was "the bible of black travel during Jim Crow...assist[ing] black travelers in finding lodging, businesses, and gas stations that would serve them along the road."[19] The need for the Green Book is now remembered by most as a cause for national embarrassment. Yet Petitioners astonishingly argue that the States should combat discrimination against LGBTQ people (and others) not by making it unlawful, but by re-creating just such a guide in the form of "websites apprising consumers of professionals in a geographical area who will celebrate same-sex weddings." Pet. Br. 61. This argument is not only demeaning to LGBTQ people, but also turns a blind eye to the pernicious inequity inherent in segregation.

This Court should reject Petitioners' invitation to return to a time when the availability of public accommodations could turn on a particular business owner's discriminatory views. And it should reject Petitioners' invitation to cripple the States' ability to

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[19] *See* Jennifer Kent & Christy Fisher, *Integration in a Post-Brown World: Conversation with Judge Marcella Holland*, Md. B.J., November/December 2016, at 34.

enact and enforce public accommodations laws to advance the States' compelling interests. States must be permitted to preserve their residents' social and economic well-being and protect everyone within their borders from the manifest harms of discrimination.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Colorado Court of Appeals.

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APPENDIX

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Appendix A: State Laws 1a

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APPENDIX A: STATE LAWS

The following States have laws prohibiting discrimination on the basis of sexual orientation in places of public accommodation. The population data is taken from the United States Census Bureau's estimate of State populations as of July 1, 2016.[1]

State	*Population*	*State Law*
California	39,250,017	Cal. Civ. Code § 51 (2016).
Colorado	5,540,545	Colo. Rev. Stat. § 24-34-601 (2014).
Connecticut	3,576,452	Conn. Gen. Stat. § 46a-64 (2017).
Delaware	952,065	Del. Code Ann. tit. 6, § 4504 (2013).
District of Columbia	681,170	D.C. Code § 2-1402.31 (2001).
Hawaii	1,428,557	Haw. Rev. Stat. § 489-3 (2006).
Illinois	12,801,539	775 Ill. Comp. Stat. 5/1-102, 5/5-102 (2015).
Iowa	3,134,693	Iowa Code § 216.7 (2007).
Maine	1,331,479	Me. Rev. Stat. tit. 5, § 4592 (2016).

[1] *See* U.S. Census Bureau, *Annual Estimates of Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016* (Dec. 2016), https://www.census.gov/data/tables/2016/demo/popest/nation-total.html.

Maryland	6,016,447	Md. Code Ann., State Gov't § 20-304 (West 2014).
Massachusetts	6,811,779	Mass. Gen. Laws. ch. 272, § 98 (2016).
Minnesota	5,519,952	Minn. Stat. § 363A.11 (2017).
Nevada	2,940,058	Nev. Rev. Stat. § 651.070 (2011).
New Hampshire	1,334,795	N.H. Rev. Stat. § 354-A:17 (2009).
New Jersey	8,944,469	N.J. Stat. § 10:5-4 (2007).
New Mexico	2,081,015	N.M. Stat. § 28-1-7 (2008).
New York	19,745,289	N.Y. Exec. Law § 291 (McKinney 2010).
Oregon	4,093,465	Or. Rev. Stat. § 659A.403 (2016).
Rhode Island	1,056,426	R.I. Gen. Laws § 11-24-2 (2017).
Vermont	624,594	Vt. Stat. tit. 9, § 4502 (2017).
Washington	7,288,000	Wash. Rev. Code § 49.60.030 (2017).
Wisconsin	5,778,708	Wis. Stat. § 106.52 (2016).

APPENDIX B: LOCAL LAWS

The following local jurisdictions have laws or ordinances prohibiting discrimination on the basis of sexual orientation in places of public accommodation and are jurisdictions *not* covered by the State-level public accommodations laws listed in Appendix A. The list is not exhaustive but includes the laws and ordinances that could be readily identified and reviewed through publicly available sources. The population data is taken from the U.S. Census Bureau's estimates of local populations as of July 1, 2016.[1] (This table omits the numerous local non-discrimination ordinances in the States listed in Appendix A.)

Population	*Ordinance*
Alabama	
212,157	Birmingham, Ala., Ordinance No. 17-121 (2017).[2]

[1] *See* U.S. Census Bureau Population Estimate Program, *Population and Housing Unit Estimates: July 1, 2016*, https://www.census.gov/programs-surveys/popest/data/tables.html); U.S. Census Bureau, *Annual Estimate of Resident Population for Counties Municipalities, Municipios, Metropolitan Statistical Areas, Micropolitan Statistical Areas, Metropolitan Divisions, and Combined Statistical Areas: April 1, 2010 to July 1, 2016* (March 2017) (data accessible at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk); U.S. Census Bureau, *Annual Estimate of the Resident Population for Cities and Towns (Incorporated Places and Minor Civil Divisions): April 1, 2010 to July 1, 2016* (May 2017) (data accessible at same link).

[2] The Ordinance was passed by the Birmingham City Council on September 26, 2017 and has not yet been codified.

Alaska	
298,192	Anchorage, Alaska, Anchorage Municipal Code tit. 5, ch. 5.20, § 5.20.050 (2015).
32,468	Juneau, Alaska, Compiled Laws of the City and Borough of Juneau, Alaska tit. 41, ch. 41.05, § 41.05.020 (2016).
Arizona	
1,615,017	Phoenix, Ariz., Phx. City Code art 1, ch. 18, §18-4 (2013).
530,706	Tucson, Ariz., Tucson City Code ch. 17, art. 3, § 17-12 (1999).
182,498	Tempe, Ariz., Tempe City Code ch. 2, § 2-603(1) (2016).
71,459	Flagstaff, Ariz., Flagstaff City Code ch. 14-02-001-0003(A) (2013).
Florida	
2,712,945	Miami-Dade County, Fla., The Code of Miami-Dade County ch. 11A, art. 3, § 11A-19 (2014).
1,909,632	Broward County, Fla., Broward County, Fla., Code of Ordinances ch. 16½, §§ 16½-3(p), 16½-34 (2011).
1,376,238	Hillsborough County, Fla., Hillsborough County Code of Ordinances and Laws ch. 30, § 30-23 (2014).
1,314,367	Orange County, Fla., Orange County Code of Ordinances ch. 22, art. 3, § 22-42 (2013).

960,730	Pinellas County, Fla., Pinellas County Code of Ordinances ch. 70, art. 2, § 70-214 (2014).
529,364	Volusia County, Fla., Municipal Code of Ordinances ch. 36, art. 3, § 36-41 (2017).
287,822	Leon County, Fla., Orange County Code of Ordinances ch. 9, art. 3, § 9-40 (2013).
263,496	Alachua County, Fla., Alachua County Code of Ordinances ch. 111, art. 1, § 111.06 (2013).
Georgia	
472,522	Atlanta, Ga., Atlanta Code of Ordinances ch. 94, art. 3, § 94-68 (2000).
Idaho	
223,154	Boise, Idaho, Boise City Code ch. 6, § 6-02-03(B) (2012).
54,746	Pocatello, Idaho, City Code tit. 9, ch. 9.36, ch. 9.36, § 9.36.030(B) (2013).
50,285	Coeur D'Alene, Idaho, Coeur d'Alene, Idaho City Code tit. 9, ch. 9.56, § 9.56.030(B) (2017).
25,322	Moscow, Idaho, Moscow City Code tit. 10, ch. 19, § 19-23(B) (2013).
Indiana	
941,229	Indianapolis-Marion County, Ind., Rev. Code of the Consolidated City and County ch. 581, art. 1, § 581-101 (2008).
264,488	Fort Wayne, Ind., Fort Wayne City Code tit. 9, ch. 93, § 93.018 (2003).

188,059	Tippecanoe County, Code of Tippecanoe County tit. 3, ch. 31, §§ 31.75, 31.76 (2001).
181,721	Vanderburgh County, Ind., Vanderburgh County Code tit. 2, ch. 2.56, § 2.56.020 (2017).
145,496	Monroe County, Ind., Monroe County Code ch. 520-2 (2016).
101,735	South Bend, Ind., Municipal Code of South Bend, Ind. ch. 2, art. 9, § 2-127.1 (2012).
77,134	Hammond, Ind., City of Hammond, Ind. Code of Ordinances tit. 3, ch. 37, § 37.057 (2015).
69,010	Muncie, Ind., Code of Ordinances tit. 3, ch. 34, div. 5, § 34.87(F) (2015).
33,104	Valparaiso, Ind. Ordinance No. 16-09 (2016).
31,157	Michigan City, Ind., Michigan City Code ch. 66, div. 3, § 66-114 (2015).
26,784	Zionsville, Ind., Zionsville Town Code tit. 9, ch. 103, § 103.07 (2015).
Kansas	
95,358	Lawrence, Kan., City Code of Lawrence ch. 10, art. 1, § 10-110 (2015).
54,983	Manhattan, Kan., Code of Ordinances City of Manhattan, Kan. ch. 10, art. 3, § 10-17 (2016).
Kentucky	
616,261	Louisville-Jefferson County, Ky., Metro Code tit. 9, ch. 92, § 92.05 (2004).

318,449	Lexington-Fayette County, Ky., Charter and Code of Ordinances Lexington-Fayette Urban County Gov't ch. 2, art. 2, § 2-33 (1999).
40,797	Covington, Ky., Covington, Ky. Code of Ordinances tit. 3, ch. 37, § 37.07 (2003).
27,855	Frankfort, Ky., City of Frankfort, Ky. Code of Ordinances tit. 9, ch. 96, § 96.08 (2013).
7,758	Morehead, Ky., City of Morehead, Ky. Code of Ordinances tit. 9, ch. 96, § 96.07 (2013).
Louisiana	
391,495	New Orleans, La., Code of the City of New Orleans, Louisiana ch. 86, art. 6, § 86-33 (1999).
194,920	Shreveport, La., City Code of Ordinances City of Shreveport ch. 39, art. 1, § 39-2 (2013).
Michigan	
672,795	Detroit, Mich., Detroit City Code ch. 27, art. 6, § 27-6-1 (2008).
120,782	Ann Arbor, Mich., Code City of Ann Arbor tit. 9, ch. 112, §§ 9:150, 9:153 (2014).
116,020	Lansing, Mich., Codified Ordinances of Lansing, Mich. tit. 12, ch. 297.04 (2016).
75,984	Kalamazoo, Mich., Kalamazoo City Code ch. 18, art. 2, § 18-20 (2009).
48,870	East Lansing, Mich., Code of Ordinances City of East Lansing, Mich. ch. 22, art. 2, § 22-35 (2012).

20,099	Ferndale, Mich., Code of Ordinances City of Ferndale, Mich. ch. 28, §28-4 (2006).
15,479	Traverse City, Mich., Codified Ordinances of Traverse City, Mich. Pt. 6, ch. 605, § 605.04 (2010).
2,555	Pleasant Ridge, Mich., Code of Ordinances City of Pleasant Ridge, Mich. ch. 40, § 40-4 (2013).
Mississippi	
169,148	Jackson, Miss., Code of Ordinances City of Jackson, Miss. ch. 86, art. 10, § 86-302 (2016).
Missouri	
998,581	St. Louis County, Mo., Code of Ordinances, tit. 7, ch. 718, § 718.020 (2012).
481,420	Kansas City, Mo., Code of Ordinances of Kansas City, Mo. vol. 1, ch. 38, art. 3, § 38-113 (2013).
311,404	St. Louis, Mo., The Charter, the Scheme, and the General Ordinances of the City of St. Louis, Mo. tit. 3, ch. 3.44, § 3.44.080(E) (2003).
120,612	Columbia, Mo., Code of Ordinances ch. 12, art. 3, div. 1, §12-35 (2012).
69,293	St. Charles, Mo., Code of Ordinances of the City of St. Charles ch. 240, art. 3, § 240.090.
Montana	
72,364	Missoula, Mont., Missoula Municipal Code tit. 9, ch. 64, §9.64.040 (2010).

45,250	Bozeman, Mont., Municipal Code of the City of Bozeman, Mont. Ch. 24, art. 10, § 24.10.050 (2014).
33,853	Butte-Silver Bow, Mont., Butte-Silver Bow Municipal Code tit. 5, ch. 5.68, §5.68.040 (2014).
31,169	Helena, Mont., Municipal Code of the City of Helena, Mont. tit. 1, ch. 8, § 1-8-4 (2017).
7,279	Whitefish, Mont., The City Code of the City of Whitefish, Mont. tit. 1, ch. 10, § 1-10-4 (2016).
Nebraska	
446,970	Omaha, Neb., Ohama Municipal Code, Charter, and General Ordinances of the City vol. I, ch. 13, art. 3, div. 1, § 13-84 (2012).
Ohio	
860,090	Columbus, Ohio, Columbus – City Code of Ordinances tit 23, ch. 2331, § 2331.04 (2008).
385,809	Cleveland, Ohio, Code of Ordinances § 667.01 (2016).
298,800	Cincinnati, Ohio, Municipal Code of Cincinnati, Ohio § 914-7 (2006).
278,508	Toledo, Ohio, Toledo Municipal Code § 554.05 (2017).
197,633	Akron, Ohio, Code of Ordinances tit. 3, ch. 38, § 38.04 (2017).
140,489	Dayton, Ohio, Code of Ordinances City of Dayton, Ohio tit. III, div. I, § 32.04 (2007).

64,312	Youngstown, Ohio, Codified Ordinances of the City of Youngstown, Ohio pt. 5, ch. 147, § 547.04 (2016).
50,279	Lakewood, Ohio, Codified Ordinances of Lakewood, Ohio pt. 5, § 516.04 (2016).
49,134	Newark, Ohio, City of Newark Code of Ordinances pt. 6, ch. 632, §632.03(c) (2007).
44,633	Cleveland Heights, Ohio, Codified Ordinances of the City of Cleveland Heights, Ohio pt. 7, ch 749, § 749.15 (2014).
31,588	Bowling Green, Ohio, City of Bowling Green Code of Ordinances tit. 3, ch. 39, §§ 39.01, 39.03 (2009).
25,341	Athens, Ohio, Code of Ordinances tit. 3, ch. 3.07, §3.07.62 (2013).
22,341	Oxford, Ohio, Codified Ordinances of the City of Oxford, Ohio pt. 1, ch. 143, § 143.04 (2008).
13,669	Bexley, Ohio, Bexley City Codes ch. 637, § 637.04 (2015).
11,189	Coshocton, Ohio, Codified Ordinances of the City of Coshocton, Ohio pt. 1, tit. 5, ch. 159, § 159.03(c) (2007).
Pennsylvania	
1,567,872	Phila., Pa., The Philadelphia Code tit. 9, § 9-1106 (1998).
1,225,365	Allegheny County, Pa., Administrative Code div. 2, ch. 215, art. 5, § 215-35 (2009).

276,207	Erie County, Pa., Erie County Code, ord. 59, art. 11 (2004).
120,443	Allentown, Pa., The Ordinances of the City of Allentown, Pa. tit. 11, art. 181, § 181.06 (2002).
87,575	Reading, Pa., Reading, Pa. Code of Ordinances pt. 5, ch. 23, § 23-509 (2009).
48,904	Harrisburg, Pa., The Harrisburg Municipal Code tit. 4, pt. 1, ch. 4-101, § 4-105.3 (1992).
41,992	State College, Pa., Borough Codification of Ordinances ch. 5, pt. E, § 505 (2011).
40,569	Wilkes-Barre, Pa., Code of Ordinances City of Wilkes-Barre, Pa. ch. 14, §§ 14-1, 14-3 (2016).
2,497	New Hope, Pa., Code of the Borough of New Hope ch. 129, art. 1, § 129-4 (2005).
South Carolina	
409,549	Richland County, S.C., Code of Ordinances of Richland County, S.C. ch. 16, art. 6, §16-68 (2011).
134,385	Charleston, S.C., Code of the City of Charleston, S.C. ch. 16, art. IV, § 16-29 (2009).
Texas	
1,492,510	San Antonio, Tex., Code City of San Antonio Tex. ch. 2, art. 10, div. 5, § 2-592 (2013).
1,317,929	Dallas, Tex., The Dallas City Code vol. II, ch. 46, art. II, § 46-6.1 (2015).

947,890	Austin, Tex., The Code of the City of Austin, Tex. Tit. 5, ch. 5-2, § 5-2-4 (1992).
854,113	Fort Worth, Tex., City of Fort Worth Code of Ordinances pt. 2, ch. 17, art. 2, § 17-48 (2010).
683,080	El Paso, Tex., A Codification of the General Ordinances of El Paso, Tex. Tit. 10, ch. 10.16, § 10.16.010 (2003).
286,057	Plano, Tex., Code of Ordinances City of Plano, Tex. ch. 2, art. I, § 2-11(d) (2014).
Virginia	
230,050	Arlington County, Va., Arlington County Code ch. 31 § 31-3(C) (2012).
155,810	Alexandria, Va., The General Ordinance of Alexandria, Va. Tit. 12, ch. 4, § 12.4.8 (1991).
46,912	Charlottesville, Va., Code of the City of Charlottesville ch. 2, art. XV, § 2-431 (2013).
West Virginia	
49,138	Charleston, W. Va., Code of the City of Charleston, W. Va. Ch. 62, art. 3, § 62-81(6) (2007).
48,113	Huntington, W. Va., Codified Ordinances of Huntington, W. Va. pt. 1, ch. 5, art. 147, § 147.08(f) (2013).
5,945	Charles Town, W. Va., Codified Ordinances of Charles Town pt. 1, ch. 5, art. 154, § 154.03(6) (2016).

3,921	Lewisburg, W. Va., Codified Ordinances of Lewisburg, W. Va. Pt. 1, ch. 5, art. 137, § 137.08(f) (2016).
Wyoming	
32,382	Laramie, Wyo., Laramie, Wyo. Municipal Code tit. 9, ch. 9.32, § 9.32.040 (2015).